

1 MICHAEL E. TANKERSLEY (DC Bar # 411978)

2 mtankersley@ftc.gov

3 GREGORY A. ASHE (VA Bar # 39131)

4 gashe@ftc.gov

5 PATRICK ROY (DC Bar # 1023521)

6 proy@ftc.gov

7 CARLTON B. MOSLEY (DC Bar # 1644552)

8 cmosley@ftc.gov

9 Federal Trade Commission

10 600 Pennsylvania Avenue NW

11 Mail Stop CC-6316

12 Washington, DC 20580

13 Telephone: (202) 326-2991 (Tankersley)

14 (202) 326-3719 (Ashe)

15 (202) 326-3477 (Roy)

16 (202) 326-2163 (Mosley)

17 Attorneys for Plaintiff

18 FEDERAL TRADE COMMISSION

19 UNITED STATES DISTRICT COURT

20 DISTRICT OF ARIZONA

21 Federal Trade Commission,

22 Plaintiff,

23 v.

24 Grand Canyon Education, Inc., *et al.*,

25 Defendants.

No. CV-23-02711-PHX-DWL

**JOINT WRITTEN SUMMARY OF
DISCOVERY DISPUTE**

26 Pursuant to the Court's Scheduling Order (ECF 70), and Local Rule of Civil
Procedure 7.2(j), Plaintiff Federal Trade Commission ("FTC") and Defendant Grand
Canyon Education, Inc. ("GCE"), submit the following summary of discovery dispute
relating to Defendant's production of documents.

The FTC's Position:

Requests 1 and 2 seek documents regarding plans for the transfer of Grand Canyon University to a nonprofit and the marketing consequences of characterizing the University as a nonprofit. (ECF 97-3 at 7). Defendant GCE has limited its search for documents responsive to these requests to materials after January 1, 2017.¹

Defendant GCE's 2017 cut-off excludes relevant material. The FTC alleges that Defendants GCE and Mueller formed Gazelle University in 2014 for the purpose of advancing GCE's profits and the interest of its shareholders, including Defendant Mueller. (Amended Compl., ECF 62 ¶ 7, 11-14; Order, ECF 56 at 2-4, 28, 32). From the time it began operating Grand Canyon University, GCE acknowledged to investors that the reputation of for-profit educational institutions was a liability.² In October 2014, GCE formally notified stockholders that it had launched an effort to "explore enhancing stockholder value" by shedding the for-profit label. (Exhibit A, *Item 8.01. Other Events and Exhibit 99.1*). GCE announced this initiative – dubbed "Project Gazelle" – before Defendant Mueller incorporated "Gazelle University" (Exhibit B at 1) – the entity that would be renamed as Grand Canyon University in 2018. The senior leadership of Defendant GCE attended the initial meeting launching Gazelle University in January 2015, the General Counsel of GCE acted as the recording secretary for the meeting, and his minutes recite that GCE planning for the acquisition of the University by a nominally

¹ Defendant Mueller similarly objected to producing materials prior to July 1, 2018. (ECF 99 at 3-4).

² GCE Annual Report for 2011 at 52, at <https://investors.gce.com/static-files/796e9a44-7334-4ce7-947f-45f1587ac5c8> (noting adverse media coverage regarding for-profit education companies could damage reputation, lower enrollments, and depress stock price). In July 2012, a Senate Committee released a report that was critical of for-profit universities and included Grand Canyon University among the for-profit universities profiled by the committee. See U.S. Senate Health, Education, Labor and Pensions Committee, *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success* (July 31, 2012), https://www.help.senate.gov/imo/media/for_profit_report/Contents.pdf.

1 nonprofit entity had been underway “over the past several months.” *Id.* ¶ at 5-6.
2 Defendant GCE’s records regarding the goals, expectations and planning for this
3 initiative are squarely within the scope of discovery.

4 Defendant GCE’s objections to producing records prior to 2017 do not withstand
5 scrutiny. This dispute is not “premature” as GCE is currently excluding from its
6 collection of documents materials from the years when it evaluated whether it would be
7 worthwhile to re-brand the University, and advocated for approval to do so.³ Records
8 evaluating the impact of a nonprofit label on recruiting and revenue are relevant to the
9 parties’ dispute regarding whether Defendants’ representations are material to
10 consumers. (ECF 56 at 27-28, 32-33). Records regarding plans that were rejected are
11 relevant to the allegations that Defendants acted to advance Defendant GCE’s business
12 and Defendant Mueller’s interests. (ECF 62 ¶ 14). Defendant GCE provides no concrete
13 evidence to show burden or obstacles to access. To the contrary, GCE is excluding
14 material based on date – not based on undue burden or accessibility.

15 Defendant GCE’s argument that the discovery at issue is not proportional to the
16 needs of the case is also belied by Defendants’ ongoing pursuit of approval of their
17 nonprofit claim for more than a decade. The Ninth Circuit’s decision in *Grand Canyon*
18 *University v. Cardona*, 121 F.4th 717 (2024), underscores that this issue is a live dispute,
19 of great importance to Defendants. The Ninth Circuit’s remand also recognizes that
20 there are multiple grounds for questioning the Defendants’ characterization of the
21 University as a nonprofit. *See id.* at 726-727. The pre-2017 materials are significant to
22 Defendants’ claims that this Court should conclude that marketing the University as
23 nonprofit is either accurate or immaterial.

24
25 ———
26 ³ The “protracted process” that Defendants pursued between 2014 and 2018 is summa-
rized in *Grand Canyon University v. Cardona*, No. CV-21-00177-PHX-SRB, 2022 WL
18456049, at *1 – 3 (D. Ariz. Dec. 1, 2022), *remanded*, 171 F.4th 717 (9th Cir. 2024).

GCE's Position:⁴ While GCE maintains that Requests 1 and 2 seek materials lacking any relevance to the FTC's claims, it has nevertheless agreed to review at least tens of thousands documents dated on or after January 1, 2017, and to produce non-privileged materials it identifies as responsive to the Requests.⁵ Unwilling to compromise as to a reasonable relevant time period, however, the FTC insists that GCE review and produce a broad swath of documents dating as far back as **2014**.⁶ The FTC's request should be denied.

Request 1 seeks documents that are not relevant to the FTC's claims. Request 1 seeks the broad production of documents – including internal emails and communications with the company's advisers, accreditors, and regulators – dated 2014 to the present, relating not only to the transaction that closed in July 2018, but also to any “plans or proposals” for potential transactions that never occurred.⁷ The requested documents are not relevant to the FTC's claim that the university was marketed as a nonprofit in a deceptive manner starting in July 2018 (the “Nonprofit Claim”).

First, while the FTC suggests that it requires discovery into GCE's intent or motivations in consummating the transaction (and that, inexplicably, it must obtain such discovery from 2014 onward), the FTC has not shown how such discovery is relevant to its allegations that (a) GCU is not a nonprofit or (b) the marketing of GCU as a nonprofit for a brief period of time following the July 2018 transaction was deceptive. Either it was a nonprofit or it was not after July 2018; volumes of documents regarding *planning* for the transaction will not help resolve that question.

⁴ The Parties' negotiations regarding Requests 1 and 2 remain ongoing in a number of respects. The FTC's request to file a Joint Statement is, therefore, premature.

⁵ GCE's agreement in this respect pre-dates GCE's current agreements as to the relevant time periods applicable to the FTC's other discovery requests by at least one year.

⁶ While neither the FTC's present statement nor its requests for production propose a relevant time period, the FTC has demanded during the parties' meet and confer process that GCE collect and review documents dating back to “at least” 2014.

⁷ See Plaintiffs' Revised First Set of Requests for Production of Documents to Defendant Grand Canyon Education, Inc. (attached hereto as Ex. C), at p. 6.

1 *Second*, documents concerning potential transactions that did not occur are simi-
2 larly not relevant to whether GCU was a nonprofit following the 2018 transaction. Yet, in
3 demanding discovery from 2014 on, those are precisely the documents the FTC seeks.

4 *Third*, as detailed below, GCE has agreed to produce various submissions to and
5 decisions from the enumerated agencies, as well as the parties' formal transaction docu-
6 ments. But in seeking both internal communications and "all records of Communications"
7 with these agencies regarding "plans or proposals" for the sale of GCU from 2014 onward,
8 the FTC appears to be attempting to reevaluate and potentially supplant other federal agen-
9 cies' determinations. Nothing in the Complaint, however, supports this ploy, and the
10 FTC's broad request for such documents should be denied accordingly.

11 *Finally*, to the extent the FTC's allegations rely upon the Department of Educa-
12 tion's ("DOE") determination not to permit GCU to participate in Title IV as a nonprofit,
13 the Ninth Circuit recently overturned that decision because the agency applied the incor-
14 rect legal standard. *Grand Canyon Univ. v. Cardona*, 2024 U.S. App. LEXIS 28414. De-
15 fendants are assessing the impact of the Ninth Circuit decision on the FTC's claims, and
16 GCE reserves the right to seek a stay of all nonprofit-related discovery (including Requests
17 1 and 2) and/or to object to the relevancy of such discovery in light of the same.

18 **Request 2 seeks documents that are not relevant to the FTC's claims.** Request
19 2 seeks "[a]ll records containing, discussing, or evaluating marketing plans in which
20 [GCU] would be advertised, or is described, as a nonprofit, and any projections, analyses,
21 or evaluations of the impact of such advertising or descriptions on recruiting, enrollment,
22 revenue, or costs." GCE again offered to review potentially responsive documents, sub-
23 ject to a reasonable search, dated on or after January 1, 2017. But once again, the FTC
24 insists upon the review and production of documents dated 2014 onward, despite conced-
25 ing (as they must) that GCU was not marketed as a nonprofit until after the transaction
26 closed in July 2018. Again, the FTC cannot demonstrate the relevancy of potential

1 marketing plans or analysis of revenue impact for potential transactions that did not occur.
2 The request for documents starting in 2014 should, therefore, be denied. Moreover, per
3 the FTC's own initial disclosures, the FTC does not claim damages with respect to the
4 Nonprofit Claims. Ex. D at 6-8. Thus, documents concerning the potential revenue impact
5 of marketing GCU as a nonprofit are not relevant to any proffered theory of damages.

6 **The FTC's proposed time period applicable to Requests 1 and 2 is not propor-**
7 **tional to the needs of this case.** The FTC's demand that GCE produce documents dated
8 2014 onward is unduly burdensome and not proportional to the needs of this case, partic-
9 ularly given the FTC's tenuous relevancy arguments on a claim that barely survived
10 GCE's motion to dismiss.

11 In response to Requests 1 and 2, GCE has already agreed to review at least tens of
12 thousands of documents produced in recent shareholder litigation concerning the 2018
13 transaction, the DOE's nonprofit determination, and the company's public disclosures re-
14 garding the same, starting on January 1, 2017, *i.e.*, a full ***eighteen months*** before the trans-
15 action closed and the university was marketed as a nonprofit. GCE additionally agreed to
16 produce, among other things: (1) Gazelle's application to the IRS for 501(c)(3) status and
17 (2) formal submissions made to the DOE in connection with GCU's request to be treated
18 as a nonprofit under Title IV. GCE also previously produced certain marketing materials
19 in connection with the FTC's investigation and has agreed to discuss reasonable supple-
20 mental collections of potentially responsive documents, with a start date of 2017.

21 GCE is not required to collect and review an additional three years' worth of emails
22 and other documents, if they are even accessible at this time. The FTC's request would
23 likely result in tens or hundreds of thousands of additional documents for GCE's review.
24 In short, granting the FTC's requests for eleven years' worth of discovery would impose
25 a significant (and entirely unnecessary) burden on GCE. GCE's approach is reasonable
26 and balances the aims of relevance and proportionality.

Local Rule of Civil Procedure 7.2(j) Certification

The undersigned jointly certify that they have attempted to resolve this matter through written correspondence, telephone consultation, and sincere efforts as required by Local Rule of Civil Procedure 7.2(j), and have reached an impasse.

Respectfully submitted,

DATED: December 20, 2024

ATTORNEYS FOR PLAINTIFF
FEDERAL TRADE COMMISSION

ATTORNEYS FOR DEFENDANT
GRAND CANYON EDUCATION, INC.

/s/

Michael E. Tankersley

Gregory A. Ashe

Carlton Mosley

Patrick Roy

FEDERAL TRADE COMMISSION

600 Pennsylvania Avenue NW

Washington, D.C. 20580

Telephone: (202) 326-2991

Email: mtankersley@ftc.gov

/s/ Derin B. Dickerson

Derin B. Dickerson

Caroline R. Strumph

Shanique C. Campbell

ALSTON & BIRD LLP

1201 West Peachtree Street

Atlanta, GA 30309-3424

Telephone: 404-881-7000

Email: derin.dickerson@alston.com

caroline.strumph@alston.com

shanique.campbell@alston.com

Kathleen Benway

Graham Gardner

ALSTON & BIRD LLP

950 F Street, NW

Washington, DC 20004

Telephone: (202) 239-3034

kathleen.benway@alston.com

Graham.Gardner@alston.com

Lisa L. Garcia

ALSTON & BIRD LLP

350 South Grand Avenue, 51st Floor

Los Angeles, CA 90071

Telephone: (213) 576-1000

lisa.garcia@alston.com